

OLC 78-1929/5

September 20, 1978

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## MEMORANDUM FOR THE DCI

FROM

Fred Hitz

SUBJECT

Telephone Calls on the Electronic  
Surveillance Bill


HPSCI's Chief Counsel Mike O'Neil and the Department of Justice have asked you to telephone Rep. Ertel (D-Penna) Bob Eckhardt (D-Tex) and Bob McClory (R-Ill) concerning the security provisions in the Electronic Surveillance Bill. A memorandum on that subject prepared by Tony Lapham is attached.

It appears that Rep. Ertel intends to move tomorrow to instruct the Conferees to insist upon the amendment which he sponsored during floor consideration of the bill to strike the special courts from the legislation. You will recall that Mr. Ertel's amendment passed by a vote greater than 2 - 1. Justice and the HPSCI do not believe that Mr. Ertel will step back from his intention to instruct the House Conferees. All they wish you to do is to express your concerns about the security risks involved if we do not have in the bill procedures to centralize consideration of the warrants to be sought thereunder. If we can not look to a centralized judicial matrix, the personnel of which we can clear and the document control procedures of which we can safeguard, we will be at a distinct disadvantage. You will recall that Mr. Ertel turned this argument around and argued effectively that by creating a point of concentration for consideration of these warrant requests, we would be providing a juicy target for foreign intelligence services to penetrate. Apparently Bob Eckhardt involved himself in this argument and Bob McClory's attitude towards involvement of the judiciary in this matter is well known.

FBI Director Webster is calling these three Congressmen.

All Justice and the Committee wish you to do is to make your views known, as DCI, of the importance you attach to sound security practices in this area.

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Frederick P. Hitz

Attachment

MORI/CDF Pages 1-4

WASHINGTON, D. C. 20505

Office of General Counsel

19 September 1978

Mr. Fred Baron,  
Special Assistant to the Attorney General  
Mr. Newal Squyres,  
Office of Legal Counsel  
Department of Justice  
Washington, D.C. 20530

Dear Fred and Newal:

I understand that Senate and House conferees will meet soon to resolve differences between their respective versions of the Foreign Intelligence Surveillance Act. The purpose of this letter is to highlight those areas, on behalf of the DCI, with which we are most concerned, as follows:

a. Special courts. An amendment to the House bill not only eliminated special courts and the security advantages accruing to a single court system but also eliminated provisions which specifically addressed document, physical, personnel and communications security measures and which provided a special role for the DCI. (See subsections 103(d) and (g) of H.R. 7308 as reported by HPSCI and the accompanying HPSCI Report.) No security provision is left in section 103 as amended and the counterpart Senate provision (§ 2523) appears to speak only of records of proceedings. Whether or not special courts or the equivalent are provided for in the legislation, it is essential that the security provisions surrounding court proceedings are reinstated. We strongly recommend that appropriate statutory provisions along the lines of the language of H.R. 7308 as reported by the HPSCI be suggested by the Administration for conference consideration. Since the House version was substituted virtually in toto for S. 1566 on the floor of the House, there may be considerable discretion in developing statutory language. Appropriately broad conference report language also should be suggested to the conferees, particularly if we are required to stick with the S. 1566 security provisions. As we recall the floor debate, although it was argued that focusing warrant applications in one court increased security risks, no concerns were raised about the security procedures in the special court provisions.

NOTE: COMINT MATERIAL ATTACHED

b. Notification of surveillance. Another amendment would permit the oversight committees to notify U.S. persons targeted if either committee determines that no foreign intelligence was obtained from a surveillance and that such notification would not harm the national security (see subsection 108(b) of the House legislation). This provision is apparently based on the faulty premise that the inability to acquire foreign intelligence necessarily implies that the surveillance was or may have been inappropriate. Moreover, committee discretion to determine that disclosure would not harm the national security usurps an executive branch function and is tantamount to declassification authority. We strongly recommend that this provision be eliminated.

c. Training. The House version, at CIA's request, includes a provision permitting training of personnel in the use of electronic communications equipment in certain limited and carefully defined circumstances (see subsection 105(f)(3)). We have urged the Senate to support this House provision (see enclosed letter to Senator Bayh) and recommend that the Administration support this provision.

d. "Members" of foreign powers. Assuming that the FBI supports the House version treating members of foreign powers as agents of a foreign power, we favor the House version (see subsection 101(b)(A)).

e. Disclosure of Information to Criminal Defendants. The House version permits a court to disclose to a defendant prosecuted by the government portions of materials relating to a surveillance if there is reasonable question as to legality and disclosure would likely promote a more accurate determination of legality (see subsection 106(f)). We recommend that the Administration support the Senate version which permits disclosure in such circumstances only "where such disclosure is necessary to make an accurate determination of legality." This has been the position taken by the Administration previously, as expressed in a Department of Justice memorandum provided to the HPSCI.

f. Decriminalization of Failure to Follow Minimization Procedures. We support the House version, as amended by Rep. Ashbrook, which decriminalizes failure to follow minimization procedures (see subsection 109(a)) but note that the Senate version may be acceptable as well. I understand, however, that the criminal provision may be

rewritten to conform to S. 1437. We recommend that the Administration object to any provision which would criminalize failure to minimize properly. This would be consistent with Title III, and is the position taken by the Administration, as expressed in the Department memorandum mentioned in subpara. e. above.

g. McClory Amendment No. 9. In view of the House approval of this amendment exempting certain foreign power communications from the warrant requirement and its acceptance by influential Senate sponsors--tacit recognition that the potential risks to security in the approval process outweigh any benefits of a warrant requirement since the constitutional rights of U.S. persons are not involved--we favor strong Administration support of this amendment.

We will be more than happy to discuss these and other issues of concern to the intelligence community at your convenience. If you have any questions, please contact Bernie Makowka of my Office on 351-7541.

Sincerely,

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Anthony A. Lapham  
General Counsel

Enclosure

Approved For Release 2006/11/16 : CIA-RDP81M00980R000100060010-4

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